

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTEZ JAMAR WILLIAMS,

Defendant-Appellant.

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UNPUBLISHED

March 27, 2007

No. 266911

Wayne Circuit Court

LC No. 05-004511-01

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of three counts of armed robbery, MCL 750.529, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 9 to 15 years' imprisonment for each of the armed robbery convictions, two to four years' imprisonment for the felonious assault conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that his trial attorney failed to provide him with effective assistance of counsel. We disagree. Defendant previously moved this Court to remand for a *Ginther*<sup>1</sup> hearing to develop the record regarding his ineffective assistance claim, but his motion was denied. *People v Williams*, unpublished order of the Court of Appeals, entered September 12, 2006 (Docket No. 266911). Therefore, this Court's review is limited to mistakes apparent on the record. *People v Riley (On Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To establish a denial of effective assistance of counsel, "a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). A defendant must show that the deficiency prejudiced the defense to the extent that, but for counsel's error, the result of the proceedings would have been different. *Id.* The defendant must overcome a strong presumption that counsel's performance

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

constituted sound trial strategy and that an attorney's conduct during the course of a trial falls within the wide range of reasonable professional assistance. *Riley, supra* at 140.

While defendant maintains that he was denied his right to the effective assistance of counsel, the record does not support his claim. First, defendant argues that counsel failed to investigate the criminal backgrounds of three witnesses for the prosecution, David Tirpik, Randy Green and David Siecinski. However, it is not apparent from the existing record what efforts, if any, counsel made to investigate the criminal backgrounds of these witnesses. See *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004); *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). Thus, we cannot conclude that counsel was deficient in this regard.

Moreover, defendant has not demonstrated that an investigation of the criminal backgrounds of Tirpik, Green and Siecinski would have revealed any prior convictions that could have been used to impeach them under MRE 609. Defendant asserts that had his counsel been aware of Green's pending charges for operating a motor vehicle under the influence of intoxicating liquor (OUIL), his counsel could have used the evidence to damage Green's credibility. However, defendant fails to state how the charges could be used to undermine Green's credibility. Normally, a witness' pending charges may not be used for general impeachment purposes. MRE 609; *People v Hall*, 174 Mich App 686, 690; 436 NW2d 446 (1989). Therefore, even if defendant's trial counsel had learned of the charges, he likely could not have admitted them to impeach Green's credibility. Because defendant's trial counsel could not have used the pending charges to undermine Green's credibility, his failure to discover the existence of these charges could not have affected the outcome of defendant's trial. Therefore, a new trial on this basis is not warranted. *Mack, supra* at 129.

Second, defendant argues that his attorney was ineffective in failing to subpoena his mother, his girlfriend and the owner of the property where the robbery occurred. Defendant claims that, had these witnesses testified, he would likely have been acquitted. However, although defendant's affidavit refers generally to his trial counsel's failure to call alibi witnesses, defendant failed to make an offer of proof regarding what these witnesses would have said had they testified, and thus, has failed to establish a factual predicate for this aspect of his ineffective assistance claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Hence, defendant cannot demonstrate that counsel's decision not to call these witnesses was unsound and denied defendant a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990) ("The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense.").

Defendant also argues that counsel was ineffective because he advised defendant to waive his right to a jury trial. On appeal, defendant fails to cite a single authority or otherwise present any analysis in support of this claim. Therefore, we conclude that defendant has abandoned this claim of error. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

Defendant next argues that there was insufficient evidence to establish that he was one of the persons who robbed Tirpik, Green and Siecinski. We disagree.

This Court reviews de novo challenges to the sufficiency of the evidence. *Martin, supra* at 340. In reviewing a sufficiency challenge, this Court views the evidence in the light most

favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *Id.*

It is well established that identity is an essential element of every criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). In the present case, Tirpik, Green and Siecinski each identified defendant as one of the perpetrators of the robbery. However, defendant argues that these witnesses lacked any credibility and, consequently, their testimony is insufficient to establish that defendant perpetrated the robbery. It is true that Tirpik, Green and Siecinski were intoxicated on the night in question and that there were some factual discrepancies in their testimony. However, the witnesses' level of intoxication and the factual discrepancies in their testimony are matters of evidentiary weight and credibility, and this Court will not interfere with the trier of fact's role in determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). Rather, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Hence, the testimony of these witnesses was sufficient to establish defendant as one of the perpetrators of the robbery.

Finally, defendant contends that he is entitled to a new trial because he was denied due process and his right of confrontation when the prosecutor failed to disclose evidence of Green's pending charges. This misconduct, defendant further contends, warrants a new trial. We disagree.

A criminal defendant has a due process right of access to impeachment evidence possessed by the prosecution. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). The prosecutor is under a duty to disclose any information that would materially affect the credibility of his witnesses. *Id.* A prosecutor's failure to disclose impeachment evidence does not require automatic reversal, as this Court must still find the evidence material, meaning that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 282.

Although the prosecutor was under a duty to disclose evidence that would materially affect the credibility of his witnesses, the evidence of Green's pending charges for OUIL was inadmissible. See MRE 609(a); *Hall, supra* at 690. Green was not convicted of the offense at the time of trial and OUIL is not an offense involving dishonesty, false statement, or theft. Therefore, the prosecutor had no duty to disclose the pending charges. *Lester, supra* at 281. Furthermore, even if the prosecutor had had a duty to disclose this information, any error likely did not affect the outcome of the trial. Tirpik, Green and Siecinski all testified that defendant was one of the perpetrators and each of them individually identified defendant from a photographic lineup prior to trial.

Finally, even if we were to agree with defendant's contention that the existence of the charges constituted newly discovered evidence, defendant would not be entitled to any relief. In order to establish the right to a new trial based on newly discovered evidence, a defendant must show that the new evidence makes a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). Because defendant would not be able to use the OUIL

charges under MRE 609(a) to impeach Green's credibility, defendant cannot establish that the evidence will make a different result probable on retrial.

There were no errors warranting a new trial.

Affirmed.

/s/ Michael R. Smolenski

/s/ Henry William Saad

/s/ Kurtis T. Wilder